

JOSEPH P. RUSSONIELLO (CABN 44332)
United States Attorney

BRIAN J. STRETCH (CABN 163973)
Chief, Criminal Division

DEBORAH R. DOUGLAS (NYBN 2099372)
Assistant United States Attorney

1301 Clay Street, Suite 340S
Oakland, California 94612
Telephone: (510) 637-3680
Facsimile: (510) 637-3724
E-Mail: deborah.r.douglas@usdoj.gov

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDITH NELSON
a/k/a EDITH HONRUBIA NELSON,
a/k/a EDITH GRUTAS,
RONALD NELSON,
NELDA ASUNCION, and
CRISTETA LAGAREJOS,

Defendant.

No. CR08-477 DLJ

GOVERNMENT'S OPPOSITION TO
COURT-APPOINTED COUNSEL
WITHOUT OPPORTUNITY TO REVIEW
AND CHALLENGE DEFENDANTS'
FINANCIAL DISCLOSURES IN AN
OPEN, ADVERSARIAL PROCEEDING

Date: August 26, 2008 at 10 a.m.

Magistrate Judge Wayne D. Brazil

I. INTRODUCTION

At the court proceeding on August 5, 2008, the government informed the magistrate judge that it has substantial financial information about the defendants as the result of a long-term investigation by the Internal Revenue Service, Criminal Investigation, and the Department of Homeland Security. The government stated that, if the defendants submitted financial affidavits to obtain court-appointed counsel and requested that the affidavits be filed under seal, *ex parte* and *in camera*, it should be permitted to file *ex parte* financial information about the defendant. The

1 government further stated that it did not intend to move to unseal the defendant's financial affidavit,
2 but reserved its right to do so at a future date.

3 Upon further reflection and research, the government has revised its position as follows:
4 Any defendant who seeks to obtain court-appointed counsel should be required to submit a financial
5 affidavit and/or other evidence under penalty of perjury to satisfy his or her burden of proof to
6 establish financial eligibility, by a preponderance of the evidence, for appointed counsel pursuant
7 to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. The defendant should be precluded from
8 filing a financial affidavit or other evidence under seal, and an *ex parte, in camera* proceeding
9 should not be permitted for either the defendant or the government. Rather, both parties should
10 be provided with notice and an opportunity to rebut the other party's claims and evidence in an
11 open, adversarial proceeding.

12 Moreover, the government will agree to provide use immunity to any defendant who asserts
13 a colorable Fifth Amendment claim that providing financial information to obtain a court-appointed
14 counsel poses a "real and appreciable" risk of self-incrimination. The granting of use immunity
15 would be limited to the financial information provided by the defendant for the purpose of obtaining
16 court-appointed counsel, and would not extend to protection for perjurious or other false statements.

17 **II. ARGUMENT**

18 The defendant has the burden of establishing financial eligibility for appointed counsel.
19 United States v. Ellsworth, 547 F.2d 1096, 1098 (9th Cir. 1976); see United States v. Gravatt, 868
20 F.2d 585, 591 (3rd Cir. 1989) ("An individual who has the financial resources to obtain counsel does
21 not have a right to a court-appointed attorney"); United States v. Kaufman, 452 F.2d 1202 (4th Cir.
22 1972) ("There is no evidence in the record that [defendant] lacked sufficient funds to retain an
23 attorney to represent him. He has not shown either by testimony or by way of an affidavit that he
24 is without adequate resources to provide his own counsel").

25 In United States v. Ellsworth, *supra*, 547 F.2d at 1097-98, the Ninth Circuit held that where
26 defendant had refused to comply with the court's request that he prove his indigency by completing
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1 a financial affidavit, the defendant was not entitled to the assistance of appointed counsel.¹ The
2 assertion of a Fifth Amendment claim to preclude the court from further probing into the
3 defendant's finances, is " 'a great and beneficial shield, but not much of a sword' where the
4 defendant bears the burden of proof." *Id.* at 1098, quoting *United States v. Schmitz*, 525 F.2d 793,
5 795 (9th Cir. 1975); *United States v. Kaufman*, *supra*, 452 F.2d at 1202 (defendant refused to
6 execute an affidavit of financial status to establish his indigency and therefore was not entitled to
7 court-appointed representation).

8 None of the four defendants, all of whom were arrested and initially presented on July 25,
9 2008, have filed financial affidavits. See *United States v. Ellsworth*, *supra*, 547 F.2d 1096, 1097
10 ("The form is a standard questionnaire used in the United States District Courts. Those defendants
11 requesting appointed counsel list upon it assets and debts. Questions, simply stated, as information
12 related to employment, including monthly earnings, date of last employment if presently
13 unemployed, earnings at that time, and employment and earnings of spouse. The affiant is also
14 asked to give the nature and sources of other income, including interest, dividends, retirement
15 benefits or annuity payments").

16 It is unknown as to which, if any, defendants intend to file financial affidavits for the
17 purpose of seeking appointed counsel. The defendants have been placed on notice that filing a false
18 financial affidavit could result in additional charges, including a violation of 18 U.S.C. § 1623
19 [False Declarations], as well as a two-level upward adjustment for Obstruction of Justice under
20 U.S.S.G. § 3C1.1. See *United States v. Hernandez-Ramirez*, 254 F.3d 841, 842-44 (9th Cir. 2001)
21 (submission of a false financial affidavit to a magistrate judge for the purpose of obtaining
22 appointed counsel is sufficiently related to the offense of conviction to support a two-level
23 adjustment for obstruction of justice, where the defendant failed to disclose his ownership interest
24 in a bar).

25 The courts "are not required to conduct *ex parte*, *in camera* hearings to determine whether
26 a defendant is eligible for appointed counsel." *United States v. Sarsoun*, 834 F.2d 1358, 1363 (7th

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28 ¹ The term "indigency" is merely a "short-hand expression" of financial inability to afford
counsel. See *United States v. Moore*, 671 F.2d 139, 141 (5th Cir. 1982).

1 Cir. 1988) (en banc), citing United States v. Harris, 707 F.2d 653, 662-63 (2d Cir. 1983), United
2 States v. Kaufman, supra, 452 F.2d at 1202. As the Second Circuit noted, the Criminal Justice Act
3 “specifically provides for *ex parte* applications for services other than counsel, 18 U.S.C. §
4 3006A(e)(1), while there is no such requirement for proceedings involving the appointment or
5 termination of counsel. Apparently, *ex parte* proceedings for services for services other than
6 counsel are provided for to ensure that a defense would not be ‘prematurely’ or ‘ill-advisedly’
7 disclosed. Such considerations are not relevant to proceedings concerning the appointment or
8 termination of counsel. But since Congress obviously knew how to provide for an *ex parte*
9 proceeding when it seemed appropriate, the failure to do so in the context of appointment of counsel
10 seems significant. Moreover, our legal system is rooted in the idea that facts are best determined
11 in adversary proceedings; secret, *ex parte* hearings ‘are manifestly conceptually incompatible with
12 our system of criminal jurisprudence. . . speculative possibility of inadequate protection of
13 defendant’s fifth amendment rights is outweighed by the need to determine facts through adversarial
14 proceedings.’ ” United States v. Harris, supra, 707 F.2d at 662-63 (defendant failed to prove
15 financial inability to afford counsel).

16 This Court should conduct an adversarial, rather than *ex parte*, hearing so that both the
17 government and the defendant have the opportunity to rebut the other party’s claims and evidence
18 in an open, adversarial proceeding. See United States v. Sarsoun, supra, 834 F.2d at 1364
19 (preference for an adversarial, rather than *ex parte*, hearing so that the government has an
20 opportunity to object to the statements by the defendant); United States v. Harris, supra, 707 F.2d
21 at 661 (“a court need not take at ‘face value’ an affidavit professing ‘sudden indigency’ which
22 contains material misstatements and misrepresentations. Rather, certainly where a defendant’s
23 inability to afford counsel has been put into doubt, he has the burden of coming forward with
24 evidence to rebut the government’s evidence of ability to afford counsel. If a defendant fails to
25 come forward with additional evidence instead of relying on a terse form affidavit, and fails to
26 prove by a preponderance of the evidence that he is financially unable to afford counsel, appointed
27 counsel may be terminated”) [internal citations omitted].
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At the court proceeding before the magistrate judge on August 5, 2008, the provisionally-appointed attorney for defendant Nelda Asuncion conclusorily asserted that the Fifth Amendment may apply to disclosure of her client's financial status. However, the defendant's "claim of Fifth Amendment protection against self-incrimination is based on the assumption that execution of the financial disclosure form would incriminate him." United States v. Peister, 631 F.2d 658, 662 (10th Cir. 1980). As the Tenth Circuit noted, "[w]e know neither the financial ability of the defendant nor what use, if any, might ever be made by the government of defendant's statements with regard to financial ability. The burden is on the defendant to demonstrate financial inability in order to obtain counsel. We hold defendant should not be relieved of this burden when any conflict with the Fifth Amendment right is speculative and prospective only. The time for protection will come when, if ever, the government attempts to use the information against the defendant at trial. We are not willing to assume that the government will make such use, or if it does, that a court will allow it to do so" [internal citation omitted]. Id. at 662.

The Ninth Circuit expressly has agreed with the Tenth Circuit's holding in Peister that "[t]he time for protection will come when, if ever, the government attempts to use the information [contained in the financial affidavits] against the defendant at trial," or if the government attempts to use any information derived from the facts revealed in the affidavits." Seattle Times Company v. United States District Court, 845 F.2d 1513, 1519 (9th Cir. 1988), quoting United States v. Peister, supra, 631 F.2d at 662. The Ninth Circuit held that the defendant's "assumption is premature" that the contents of the financial affidavits would incriminate him because "[w]e do not know what use, if any, the government will try to make of the information contained in the affidavits." Id. at 1519; see United States v. Sarsoun, supra, 834 F.2d at 1364 (same); see United States v. Hitchcock, 992 F.2d 236, 239 (9th Cir. 1993) ("The Ninth Circuit has not decided the amount of protection such financial disclosures should receive").

Although acknowledging in Seattle Times that it had not previously decided whether a defendant acts under state compulsion when he discloses financial information in order to obtain appointed counsel, the Ninth Circuit "noted that execution of such an affidavit may raise fifth amendment concerns," citing the facts in United States v. Ellsworth, supra, 547 F.2d 1096, that "the

1 court did not need to address whether the testimony was compelled because any self-incrimination
2 problem was alleviated when the court assured the defendant that the affidavits would not be used
3 in a future criminal prosecution.” *Id.* at 1518 n. 4. The Ninth Circuit made clear that “[w]e do not
4 read Ellsworth as condoning the practice of assuring a defendant that material will be sealed and
5 not disclosed to the government, since any sealing order is subject to review. An unqualified
6 assurance would be appropriate only if the government agreed in advance not to utilize the
7 information if it were ordered disclosed.” *Id.*

8 The Ninth Circuit recognized in Seattle Times that the Supreme Court had considered, but
9 did not decide, the issue of whether “use immunity” conferred on a defendant to protect his
10 testimony at a suppression hearing (Simmons v. United States, 390 U.S. 377 [1968]) extends to a
11 defendant’s statements regarding his financial status to obtain court-appointed counsel. *Id.* at 1519,
12 citing United States v. Kahan, 415 U.S. 239 (1974). In Kahan, the Supreme Court stated that
13 “[t]he truth of the matter was that [defendant] was not indigent, and did not have a right to
14 appointment of counsel under the Sixth Amendment” and therefore was not “faced with the type
15 of intolerable choice Simmons sought to relieve. The protective shield of Simmons is not to be
16 converted into a license for false representations on the issue of indigency free from the risk that
17 the claimant will be held accountable for his falsehood.” *Id.* at 243.

18 In Seattle Times, the Ninth Circuit stated that, “[i]f a defendant seeking a court-appointed
19 attorney refuses to file a financial affidavit and claims the protection of the fifth amendment, we
20 have to decide the question left open in Kahan. At that time, as Justice Marshall noted, a choice
21 will be required:

22 The first alternative is to permit the defendant seeking counsel as an
23 indigent to lie about his financial situation wherever the truth might
24 be incriminating. As a second alternative, we could require the
25 defendant seeking appointment of counsel to tell the truth at the
indigency hearing, and subject him to sanctions for his willful and
knowing failure to do so, but bar use of any incriminating
information so revealed.

26 Kahan, 415 U.S. at 247, 94 S.Ct. at 1183 (Marshall, J., dissenting). If we follow the rationale of
27 Simmons and adopt the second alternative, we will hold that defendants who incriminate
28 themselves when executing financial affidavits enjoy use immunity.” Seattle Times, 845 F.2d at

1 1519. Justice Marshal concluded in Kahan that “[t]he solution, then, to the tension between the
2 Fifth and Sixth Amendments is to require the defendant seeking appointment of counsel to tell the
3 truth at his indigency hearing, and to bar use of any incriminating information so revealed. This
4 approach is fully consistent with our Fifth Amendment cases. A witness protected by the privilege
5 may rightfully refuse to answer unless and until he is protected at least against the use of his
6 compelled answers and evidence derived therefrom in any subsequent criminal case in which he is
7 a defendant.” Id. at 249.

8 Neither the Supreme Court nor the Ninth Circuit has decided the issue of whether requiring
9 a defendant to submit financial information necessary to obtain court-appointed counsel amounts
10 to compulsion under the Fifth Amendment. Without conceding the issue, and in the interests of
11 maintaining the veracity of the criminal justice system, the government will agree in advance not
12 to utilize the defendants’ financial disclosures in its case-in-chief. See United States v. Gravatt,
13 868 F.2d 585, 590 (3rd Cir. 1989) (“if the trial court deems an adversary hearing on defendant’s
14 request for appointment of counsel to be appropriate, the court may grant use immunity to the
15 defendant’s testimony at that hearing”); United States v. Ellsworth, supra, 547 F.2d at 1098
16 (defendant was “given written assurance by an order of the court that information disclosed on the
17 form could not be used for further tax prosecution”); United States v. Sarsoun, supra, 834 F.2d at
18 1364 (the judge “repeatedly assured [defendant] that the government could not use the information
19 he supplied in the financial affidavit to incriminate him”).

20 Further, the granting of use immunity resolves the magistrate judges’ concerns in United
21 States v. Hickey, 185 F.3d 1064 (9th Cir. 1999), and United States v. Hyde, 208 F.Supp.2d 1052
22 (N.D.CA 2002), that financial information disclosed by the defendant to obtain court-appointed
23 counsel could be used in the government’s case-in-chief.
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CONCLUSION

For all the reasons stated above, the United States respectfully submits that this Court should (1) preclude any defendant who seeks court-appointed counsel from filing a financial affidavit under seal, *ex parte* and *in camera*; (2) provide the government and defendant with the opportunity to rebut the other party's claims and evidence in an open, adversarial proceeding; and (3) upon the government's motion, grant use immunity to any defendant who asserts a colorable Fifth Amendment claim based upon the defendant's financial disclosures to obtain court-appointed counsel.

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

8/16/08
Dated


DEBORAH R. DOUGLAS
Assistant United States Attorney